Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD H. THIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the government violated its plea agreement with petitioner.

2. Whether the consecutive sentences imposed on petitioner violated his rights under the Double Jeopardy Clause.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Blockburger v. *United States*, 284 U.S. 299 (1932)	7
Santobello v. *New York*, 404 U.S. 257 (1971)	5
United States v. *Andersson*, 813 F.2d 1450 (9th Cir. 1987)	7
United States v. *Broce*, 109 S. Ct. 757 (1989)	5, 7
United States v. *Carbone*, 739 F.2d 45 (2d Cir. 1984)	6
United States v. *Corsentino*, 685 F.2d 48 (2d Cir. 1982)	6
United States v. *Crusco*, 536 F.2d 21 (3d Cir. 1976)	6
United States v. *Hernandez*, 591 F.2d 1019 (5th Cir. 1979)	4
United States v. *McCray*, 849 F.2d 304 (8th Cir. 1988)	6
United States v. *Piccolo*, 696 F.2d 1162, aff'd en banc, 723 F.2d 1234 (6th Cir. 1983), cert. denied, 466 U.S. 970 (1984)	7

Constitution, statutes and rule:

U.S. Const. Amend. V (Double Jeopardy Clause)	4, 5, 7
18 U.S.C. 371	2
21 U.S.C. 841(a)(1)	2
21 U.S.C. 952(a)	2
Fed. R. Crim. P. 11	2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1309

RICHARD H. THIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8-35) is unpublished, but the decision is noted at 889 F.2d 272 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1989. A petition for rehearing was denied December 11, 1989 (Pet. App. 36). The petition for a writ of certiorari, styled a "Jurisdictional Statement," was filed on February 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After negotiating a plea agreement with the United States Attorney for the Western District of Louisiana, petitioner pleaded guilty to each of four counts of a bill of information (Pet. App. 48-54), including conspiracy to defraud the United States of income taxes, in violation of 18 U.S.C. 371; importation of marijuana, in violation of 21 U.S.C. 952(a); possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and distribution of marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive five-year terms of imprisonment on each of the four counts, for a total of 20 years' imprisonment. Pet. App. 1-7. The court of appeals affirmed.

1. The facts are stated in the opinion of the court of appeals. Pet. App. 9-15. Petitioner, an attorney, was initially charged in nine counts of an 18-count federal indictment in which more than 20 persons were charged with drug-trafficking and money-laundering offenses. The charges against petitioner exposed him, if convicted, to possible life imprisonment. *Id.* at 9-10.

The government and petitioner reached a plea agreement on January 8, 1987, with petitioner personally participating in the plea discussions. Petitioner agreed to plead guilty to drug-trafficking and money-laundering charges that would expose him to a maximum of 20 years' imprisonment in exchange for the government's agreement to dismiss all other charges. Pet. App. 10-11.

2. The district court questioned petitioner in open court before accepting his guilty plea. Pursuant to Fed. R. Crim. P. 11, the judge explained all the charges and the elements that the government would be required to prove. The court then asked peti-

tioner: "[Y]ou understand that you face a maximum possible total on all counts of twenty years of imprisonment and a fine of $60,000? Do you understand that?" Petitioner answered: "Yes, sir." Pet. App. 12. In addition, that maximum potential sentence was explicitly set forth in the plea agreement. *Id.* at 13 n.5.

Prior to sentencing, petitioner had requested in writing that the government agree to immediate parole eligibility, reduce his prison exposure to 15 years, and recommend incarceration in a minimum security facility. Those proposals were rejected by the government and not included in the final plea agreement (Pet. App. 38-47), because the government believed that petitioner's management of the drug importation and distribution operation out of which the charges arose did not merit such leniency. *Id.* at 13-14.

At the sentencing on October 21, 1988, the government was silent respecting the term of imprisonment that should be imposed by the judge (Pet. App. 20), but actively opposed petitioner's request for immediate parole eligibility and for incarceration in a minimum security facility. *Id.* at 18. Petitioner was sentenced to consecutive five-year terms of imprisonment on each of the four counts to which he pleaded guilty. He was not granted immediate parole eligibility and the sentencing judge did not recommend that prison authorities place petitioner in a minimum security facility. *See id.* at 1-7.

3. On appeal, petitioner sought resentencing before a different judge, arguing that the government had breached its plea agreement when it opposed petitioner's requests for immediate parole eligibility and minimum security incarceration. Petitioner argued that the government's opposition to his sentenc-

ing requests was precluded by the following sentence in the plea agreement: "The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be." Pet. App. 18.

The court of appeals ruled (Pet. App. 17-24) that the plea agreement, properly interpreted, precluded the government only from taking a position on the term of years to which petitioner would be sentenced. The court noted that "[a]t no time did the government agree to stand silent with respect to the unrelated issues of parole eligibility or place of confinement." *Id.* at 22. Because it found petitioner's interpretation of the plea agreement "unreasonable and strained" (*id.* at 19), especially in light of the history of the plea negotiations (*id.* at 23-24), the court held that the government had not breached its obligations under the plea agreement.

The court of appeals also rejected petitioner's contention that the Double Jeopardy Clause precluded consecutive sentences for both possession with intent to distribute and distribution of the same illegal drugs. Pet. App. 27-33. Although a previous Fifth Circuit decision had held that separately alleged offenses of possession with intent to distribute and distribution of the same drugs merged into a single offense, see *United States* v. *Hernandez*, 591 F.2d 1019 (5th Cir. 1979) (en banc), the court found this principle inapplicable because *Hernandez* did not involve a guilty plea or any other conduct waiving the defendant's double jeopardy protections. Pet. App. 28-29. In this case, by contrast, in exchange for dismissal of charges that exposed him to a potential sentence of life imprisonment (see *id.* at 10), petitioner had himself "selected [the two counts in question] to be included in the superseding bill of information [to

which he pleaded guilty] in order to comply with the government's demand that he be exposed to a minimum twenty-year sentence." *Id.* at 29. At the time of sentencing, petitioner was specifically informed of the possible sentence he could receive. *Id.* at 12. Relying on *United States* v. *Broce*, 109 S. Ct. 757 (1989), the Court held that petitioner's knowing waiver, coupled with the fact that the offenses to which petitioner pleaded guilty were facially distinct because the charged conduct occurred on two different days, see Pet. App. 30-31, led to the conclusion that petitioner had validly waived any possible double jeopardy challenge to the charges. *Id.* at 31.

ARGUMENT

1. Petitioner reasserts (Pet. 12-19) his claim that the government breached its plea agreement by opposing his requests for immediate parole eligibility and for minimum security confinement. He claims that the Fifth Circuit's ruling on that point creates a conflict among the courts of appeals. Contrary to petitioner's suggestion, no such conflict exists. This case turns entirely on a factual question concerning the meaning of petitioner's plea agreement. That question was correctly resolved against petitioner by the court of appeals and does not merit review by this Court.

In *Santobello* v. *New York*, 404 U.S. 257, 262 (1971), the Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." In this case, the government promised "that it will not take a position as to what the actual term of imprisonment in this matter should be." Pet. App. 44. In light of the history of the plea negotia-

tions, as well as the other specific terms of the agreement, the court of appeals construed this provision as pertaining only to the term of years imposed in the sentence, not the conditions of confinement or the prospects for parole. The court also ruled that petitioner, a lawyer who had participated directly in the plea negotiations, fully understood the limitations of the plea agreement. This was demonstrated by petitioner's unsuccessful request to the government prior to sentencing for it to take a favorable position on petitioner's parole eligibility and the conditions of his confinement.

Each of the four cases that petitioner claims to be in conflict with the court of appeals' decision involved different language in the plea agreement and a different negotiation history; in each of those cases, the court ruled that the government had breached the agreement as it was reasonably understood by the parties. See *United States* v. *McCray*, 849 F.2d 304, 305 (8th Cir. 1988) (per curiam) (government promised "not [to] make any recommendation as to the sentence to be imposed"); *United States* v. *Carbone*, 739 F.2d 45, 45 (2d Cir. 1984) (government would "make no recommendation to the sentencing judge as to the sentence which [defendant] may be given"); *United States* v. *Corsentino*, 685 F.2d 48, 49 (2d Cir. 1982) ("government agrees to take no position at sentence"); *United States* v. *Crusco*, 536 F.2d 21, 24 (3d Cir. 1976) ("[g]overnment would take no position as to maximum sentencing imposed in this case"). Because each of those cases turned on its own facts, the fact that the court of appeals in this case reached a result different from that reached in the four cases cited by petitioner does not imply the existence of a conflict among the circuits as to any question of law.

2. Petitioner also reasserts (Pet. 19-20) his argument that the count alleging drug possession with intent to distribute and the count alleging distribution of the same drugs constituted a single offense under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), and that by imposing consecutive sentences for the two offenses the district court violated the Double Jeopardy Clause.

In *United States* v. *Broce*, 109 S. Ct. 757 (1989), this Court upheld a plea bargain that involved defendants' guilty pleas to two separate conspiracies that were later held to constitute only a single criminal transaction. The Court concluded that a plea-bargaining defendant relinquishes his right to raise a double jeopardy claim so long as the allegations to which he pleaded guilty, on their face, state two separate offenses. *Id.* at 763. In this case, the possession with intent to distribute offense and the distribution offense were alleged to have occurred on separate days. Thus the requirement of *Broce* was fulfilled. Petitioner fully understood that he was exposing himself to cumulative sentencing on these two offenses; he knowingly and intelligently waived his right to contest the cumulative sentences he actually received.*

---

* Petitioner's assertion (Pet. 20) that the Fifth Circuit's decision conflicts with decisions of the Sixth and Ninth circuits, see *United States* v. *Andersson*, 813 F.2d 1450 (9th Cir. 1987); *United States* v. *Piccolo*, 696 F.2d 1162, aff'd en banc, 723 F.2d 1234, 1241 & n.2 (6th Cir. 1983), cert. denied, 466 U.S. 970 (1984), is mistaken. In both of the cases cited, the defendant—unlike petitioner—had been convicted following a jury trial in which the defendant preserved his double jeopardy claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

APRIL 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 847